

Motion allowed. S/M Gordon, 3/12/13

WHEREFORE the parties ask that the Court grant this Joint Motion and enter an order terminating the Consent Decree.

Respectfully submitted,

Plaintiffs,

UNITED STATES OF AMERICA,

CARMEN M. ORTIZ
United States Attorney

/s/

George B. Henderson, II
Assistant United States Attorney
United States Attorney's Office
John J. Moakley U.S. Courthouse
1 Courthouse Way, Suite 9200
Boston, MA 02210
(617) 748-3100
George.Henderson2@usdoj.gov

For the COMMONWEALTH OF
MASSACHUSETTS

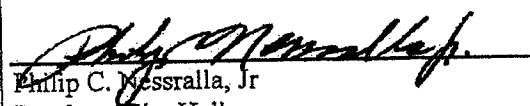
MARTHA COAKLEY
Attorney General

I. Andrew Goldberg
Assistant Attorney General
Environmental Protection Division
Massachusetts Office of the Attorney General
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 727-2200
andy.goldberg@state.ma.us
Dated:

Defendant,

CITY OF BROCKTON

PHILIP C. NESSRALLA, JR.
City Solicitor


Philip C. Nessralla, Jr.
Brockton City Hall
45 School Street
Brockton, Mass. 02301
(508) 580-7110

Dated:

CERTIFICATE OF SERVICE

I, George B. Henderson, II, Assistant United States Attorney, hereby certify that this document filed through the ECF system will be sent electronically to registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants by First Class Mail.

/s/

George B. Henderson, II

Dated: January __, 2013

Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
COMMONWEALTH OF MASSACHUSETTS,)	
)	CIVIL ACTION NO. 06-11334-NMG
Plaintiff-Intervenor,)	
)	
v.)	
)	
CITY OF BROCKTON,)	
MASSACHUSETTS,)	
)	
Defendant.)	

**MEMORANDUM IN SUPPORT OF JOINT MOTION
TO TERMINATE CONSENT DECREE**

The parties submit this Memorandum in support of their joint motion to terminate the Consent Decree entered in this action on September 28, 2006. The Consent Decree should be terminated pursuant to its express terms because the defendant the City of Brockton (the "City") has fulfilled its obligations under the Consent Decree, and has met all conditions for terminating the Consent Decree.

BACKGROUND

On behalf of the U.S. Environmental Protection Agency ("EPA"), the United States commenced this action against the City under the Clean Water Act, 33 U.S.C. § 1311(a), by filing a Complaint on August 30, 2006, and simultaneously lodged with the Court a proposed negotiated Consent Decree. On September 27, 2006, upon an assented-to Motion, the Commonwealth of Massachusetts, on behalf of the Massachusetts Department of Environmental Protection ("MADEP"), was granted the right to intervene as a plaintiff in the action.

The Consent Decree provides for settlement of the governments' claims upon payment by the City of a civil penalty of \$120,000 (shared equally between the United States and the Commonwealth); completion of three phases of remedial measures and upgrades to the City's publicly-owned treatment works ("POTW"); design and implementation of a program of inflow and infiltration removal; and the performance of three Supplemental Environmental Projects (the "SEPs"). D. 6. Under the Consent Decree, the City agreed to spend up to \$80,000 on a water quality assessment SEP, and to spend at least \$180,000 in total on the three SEPs. D. 6 at 42-48.

Following publication in the Federal Register and completion of the public comment period pursuant to 28 C.F.R. 50.7, the United States and the Commonwealth moved for entry of the Consent Decree by the Court. D. 5. The Court entered judgment in accordance with the Consent Decree on September 28, 2006. D. 6. Pursuant to the Consent Decree, ¶ 78, the Court retained jurisdiction to modify and enforce the terms of the Consent Decree, and to resolve any disputes arising thereunder.

Termination of the Consent Decree is Appropriate Because the City Has Fully Complied With the Terms of the Consent Decree

Since entry of the Consent Decree, the City has abided by its terms and acted in good faith to implement the actions required thereunder. The Consent Decree, ¶ 82, contains a clause that provides for termination of the Consent Decree by the Court upon joint motion of the Parties:

after the City has paid all outstanding penalties, completed all SEPs [and] remedial measures . . . and has achieved substantial compliance with the Permit, except for the Permit's copper effluent limits for a period of one year.

In accordance with that provision, the parties hereby assert that termination of the Consent

Decree is appropriate because the City has complied with these conditions for termination.

In determining whether to terminate its supervision or jurisdiction over a consent decree, a court must look to the terms of the decree itself. *Heath, et al. v. DeCourcy, et al.*, 992 F.2d 630, 633 (6th Cir.1993) (citing *Youngblood v. Dalzell*, 925 F.2d 954, 961 (6th Cir.1991)). Here, the express requirements in the Consent Decree, ¶¶ 7 – 44, and the conditions for termination under ¶ 82, have been met. Specifically, the City has paid the civil penalties; implemented and completed Phases 1-3 of upgrades to its POTW; designed and implemented the “I/I Removal Plan” to address infiltration and inflow in its collection system; and met the reporting and operational practices requirements of the Consent Decree. The City has also completed the SEPs to the satisfaction of both EPA and MADEP; has spent the maximum of \$80,000 for water quality assessment; and has spent a total of at least \$180,000 for the three SEPs.

The termination provision also requires that the City must have achieved substantial compliance with the National Pollutant Discharge Elimination System (“NPDES”) Permit No. MA 0101010 (the “Permit”), “except for the Permit’s copper effluent limits,” for a continuous period of one year. The City has done so, and the permit shall remain in full force and effect following termination of the Consent Decree.¹

Accordingly, all conditions for termination set forth in the Consent Decree, ¶ 82, have been met, and we attach as Exhibit A a copy of Brockton’s written certification to that effect. Moreover, the United States and the Commonwealth are aware that the City has implemented

¹ As to the Permit’s copper effluent limits, once the Consent Decree is terminated pursuant to this Joint Motion, the Administrative Order issued by EPA in AO 06-09 (the “Copper AO”) shall remain in full force and effect, and the effluent limitations, conditions, and requirements of the Permit with respect to copper shall be governed by the Copper AO.

additional upgrades beyond those required by the Consent Decree, including various sewer system capital improvements and Phase 4 Advanced Water Reclamation Facility upgrades, and also has agreed to perform additional river assessment monitoring annually at local waterways.

For all of the above reasons, the parties request that their Motion to Terminate Consent Decree be granted, and the Court order that the Consent Decree be terminated and the Court's jurisdiction over the Consent Decree likewise be concluded.

Plaintiff,

UNITED STATES OF AMERICA,
CARMEN M. ORTIZ
United States Attorney

/s/

George B. Henderson, II
Assistant United States Attorney
United States Attorney's Office
John J. Moakley U.S. Courthouse
1 Courthouse Way, Suite 9200
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For the COMMONWEALTH OF
MASSACHUSETTS
MARTHA COAKLEY
Attorney General

I. Andrew Goldberg
Assistant Attorney General
Environmental Protection Division
Massachusetts Office of the Attorney General
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 727-2200
andy.goldberg@state.ma.us

Dated:

Respectfully submitted,

Defendant,

CITY OF BROCKTON
PHILIP C. NESSRALLA, JR.
City Solicitor

Philip C. Nessralla, Jr
Brockton City Hall
45 School Street
Brockton, Mass. 02301
(508) 580-7110

Dated:

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Dated: January __, 2013

/s/
George B. Henderson, II
Assistant United States Attorney

Florio Patricia

From: Smith, Barbara H. (USAMA) [Barbara.H.Smith@usdoj.gov]
Sent: Thursday, January 10, 2013 3:28 PM
To: Law
Cc: Henderson, George (USAMA); Goldberg, Andy (AGO) (andy.goldberg@state.ma.us)
Subject: Termination of Consent Decree
Attachments: 2013-01-10 Memo in support of Jt Motion to Terminate Consent Decree.rtf; 2013-01-10 Joint Motion to Terminate Consent Decree.rtf

Attention: Philip C. Nessralla, Jr.

Attorney Nessralla,

We spoke some months ago about filing a joint motion to terminate the Consent Decree entered back in 2006 to resolve claims under the Clean Water Act. You said at that time to send the draft documents to you when we had them ready. It has taken a little longer than we anticipated to pin down the necessary information but it seems we will be ready to proceed shortly, and so we wanted to provide you with drafts of the Joint Motion and brief.

This is of course subject to approvals by the appropriate management-level officials at both the state and federal government.

Also, since I am leaving the U.S. Attorney's Office for a new job, my colleague, George (Bunker) Henderson will taking over the case to see this last phase through. I have copied him as well as Assistant Attorney General Andrew Goldberg on this e-mail so you will have their e-mail contact, and their other coordinates are on the draft documents attached to this e-mail.

Thanks for your attention to this. Please contact Bunker with any questions at 617-748-3272, or send them be e-mail to Bunker and Andy both.

Sincerely,

Barbara Healy Smith
Assistant U.S. Attorney
John J. Moakely U.S. Courthouse
1 Courthouse Way, Suite 9200
617-748-3263

Florio Patricia

From: Florio Patricia
Sent: Thursday, March 14, 2013 8:47 AM
To: 'Henderson, George (USAMA)'
Subject: RE: USA and Commonwealth of Massachusetts v. City of Brockton

Dear Attorney Henderson,

Thank you for forwarding a copy of the Order terminating the consent decree. I believe that the .pdf version will be sufficient for this office to close our file, so there is no need to forward a paper copy.

Again, thank you for your courtesy and assistance in this matter.

Patricia Florio, Paralegal

From: Henderson, George (USAMA) [<mailto:George.Henderson2@usdoj.gov>]
Sent: Thursday, March 14, 2013 8:23 AM
To: Florio Patricia
Subject: FW: USA and Commonwealth of Massachusetts v. City of Brockton

From: Henderson, George (USAMA)
Sent: Wednesday, March 13, 2013 4:30 PM
To: Henderson, George (USAMA)
Cc: bandrowicz.toni@epamail.epa.gov; Goldberg, Andy (AGO) (andy.goldberg@state.ma.us)
Subject: RE: USA and Commonwealth of Massachusetts v. City of Brockton

Dear Ms. Florio,

Attached please find the court's order allowing the joint motion to terminate the consent decree. Kindly bring this to Mr. Nessralla's attention. If you request, I will send you a paper copy by mail.

George B. Henderson, II
Assistant U.S. Attorney
John J. Moakley U.S. Courthouse, Suite 9200
1 Courthouse Way
Boston, MA 02210
Phone: (617) 748-3272
Fax: (617) 748-3971
george.henderson2@usdoj.gov

From: Henderson, George (USAMA)
Sent: Tuesday, January 29, 2013 10:18 AM
To: 'Florio Patricia'
Subject: RE: USA and Commonwealth of Massachusetts v. City of Brockton

Thank you.

From: Florio Patricia [<mailto:pflorio@cobma.us>]
Sent: Tuesday, January 29, 2013 9:58 AM
To: Henderson, George (USAMA)
Subject: USA and Commonwealth of Massachusetts v. City of Brockton

Dear Attorney Henderson:

In accordance with our telephone conversation of this date, enclosed please find the Joint Motion to Terminate Consent Decree and Memorandum with regard to the above-captioned matter, which has been signed by City Solicitor Phillip Nessralla. Please let me know if anything further is needed from this office.

Very truly yours,

Patricia Florio, Paralegal